

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

THOMAS PELLEGRINO,	)	Civ. 09-4151-KES
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER DISMISSING CASE
	)	
DOUGLAS WEBER, Warden,	)	
South Dakota State Penitentiary;	)	
DR. EUGENE REGIER, Medical	)	
Director, SDSP/DOH Health	)	
Services;	)	
DONEEN HOLLINGSWORTH,	)	
Secretary of Health, SD	)	
Department of Health;	)	
TIM REISCH, Secretary of	)	
Corrections, SD Department of	)	
Corrections;	)	
DOUG LOEN, Policy Analyst/SDSP	)	
Staff Attorney;	)	
DR. JEFF LUTHER, Medical	)	
Director for Department of Health	)	
Correctional Health Care;	)	
DR. WILLIAM BRUNNER,	)	
Dermatologist, Sanford	)	
Dermatology;	)	
SANFORD MEDICAL CENTER;	)	
JULIE SPURRELL, Clinical	)	
Supervisor, SDSP/DOH Health	)	
Services;	)	
J.P. SYVERSON, Charge Nurse,	)	
SDSP/DOH Health Services;	)	
JESS OAKLEY, Medical	)	
Assistant/Physician Assistant,	)	
SDSP/DOH Health Services;	)	
CBM FOOD SERVICES;	)	
MARLIN SEJNOHA, JR;	)	
JOHN DOE, Dieticians I & II;	)	

	)
JANE DOE, Dieticians I& II; DR	)
HESHAM ELGOUHARI; Avera Liver	)
Center;	)
VINCE NESHEIM, Nurse,	)
SDSP/DOH Health Services;	)
MS. SCOVILL, Nurse, SDSP/DOH	)
Health Services;	)
GINA BUTTERWORTH, AR	)
Coordinator & Secretary, SDSP;	)
MARY BURGGRAAF, Unit	)
Coordinator, SDSP;	)
HEALTH CARE MEDICAL	)
TECHNOLOGY INC.;	)
DR. MICHAEL ROST, President;	)
HCMTI;	)
LEANNE PETERSON, Nurse,	)
SDSP/DOH Health Services;	)
NURSE HOLLY, SDSP/DOH	)
Health Services;	)
LEE PERSON;	)
MR. T. ANAWSKI; Corrections	)
Officer, SDSP;	)
S. BAKER, CO (Major);	)
T. LAIS, SDSP Unit Coordinator;	)
	)
Defendants,	)
	)
and SALVATORE PELLEGRINO,	)
	)
Interested Party.	)

Plaintiff, Thomas Pellegrino, filed this lawsuit pursuant to 42 U.S.C. § 1983. He moved to proceed in forma pauperis, along with a supporting affidavit, explaining why he perceived himself to be in imminent danger and thus, exempt from his status as a three-strike litigant. Pellegrino's motion to proceed in forma pauperis was initially denied, but in December of 2009, he

moved for reconsideration of that denial and explained he had been denied follow-up treatment for excess stomach fluids, esophagus issues, and low hemoglobin. This court found the new allegations met the imminent danger exception in 28 U.S.C. § 1915(g). The case was then referred to Magistrate Judge John Simko pursuant to 28 U.S.C. § 636(b)(1)(B) for the purpose of conducting any necessary hearings, including evidentiary hearings.

On September 27, 2010, Magistrate Judge Simko submitted his report and recommended that Pellegrino's in forma pauperis status be revoked and that the case be dismissed for failure to state a claim upon which relief may be granted. Docket 111. Pellegrino<sup>1</sup> was notified in the report and recommendation that he had 14 days to file objections to the report. Even though no objections were filed that would require de novo review under *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990), the court reviewed the matter de novo and finds that the magistrate judge's report and recommendation is adopted in full. Therefore, it is

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<sup>1</sup> On September 28, 2010, the court was notified that Pellegrino died on September 27, 2010. Docket 112, Notice. Pellegrino's brother, Salvatore Pellegrino, moves for substitution as plaintiff under Rule 25(a)(1). Docket 114. Defendants argue that Salvatore is not a proper party for substitution. Docket 116. But even if the motion were granted, Salvatore would stand in Pellegrino's shoes. Because the case is dismissed for failure to state a claim, the motion for substitution is moot.

ORDERED that the report and recommendation of Magistrate Judge Simko (Docket 111) is accepted in full and the case is dismissed without prejudice for failure to state a claim upon which relief may be granted.

IT IS FURTHER ORDERED that all outstanding motions are denied as moot.

Dated December 16, 2010.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER  
CHIEF JUDGE